No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM 1984

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS.

ROBERT RUBANE DIAZ,
Defendant.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

GERALD J. GEERLINGS, County Counsel
JOYCE ELLEN MANULIS REIKES,
Deputy County Counsel
GLENN ROBERT SALTER,
Deputy County Counsel
3535 Tenth Street, Suite 300
Riverside, California 92501
(714) 787-2421
Attorneys for Respondent

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6030.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statute

No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM 1984

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
VS.
ROBERT RUBANE DIAZ,
Defendant.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Respondent Superior Court of the State of California for the County of Riverside respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the Supreme Court of the State of California's decision in this case. That decision is reported at 37 Cal.3d 772.

REASONS FOR DENYING THE WRIT

I.

AS CALIFORNIA STATUTORILY RECOGNIZES A PUBLIC RIGHT OF ACCESS TO PRELIMINARY HEARINGS, THERE IS NO NEED TO GRANT CERTIORARI TO DETERMINE IF THERE IS ALSO A CONSTITUTIONAL RIGHT OF ACCESS.

The first Question Presented in the Petition is whether the public's constitutional right of access to criminal proceedings extends to preliminary hearings. Petitioner asserts that since this Court's decision in *Gannett Co. v. DePasquale* (1979) 443 U.S. 368 "considerable uncertainty" exists as to whether there is a First Amendment right of access to pretrial proceedings and that the time is ripe to resolve the issue. (Petition, p. 5.) However, this is the wrong case to test the issue.

California already recognizes the public's right of access to preliminary hearings. California Penal Code Section 868, as amended, specifically states that "the examination shall be open and public" and that the public can be excluded only when the magistrate finds that closure "is necessary in order to protect the defendant's right to a fair and impartial trial." Although the California Supreme Court did not find the right of access to be of constitutional derivation, it did find that Section 868 does establish a statutory right of access to preliminary hearings. (*Press-Enterprise v. Superior Court* (1984) 37 Cal.3d at 777).

Certainly, the California Supreme Court's decision has not deprived either the press or the public of the right of access to preliminary hearings: the only difference lies in the fact that Petitioner would prefer to see the right characterized as of constitutional dimension rather than solely statutory. But this Court has consistently held that

it will not pass upon constitutional questions if there is another ground on which the case may be disposed. *Escambia County v. McMillan* (1984) ____ U.S. ____, 80 L.Ed.2d 36; *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 347 (Brandeis, J., dissenting). Here, the right which Petitioner seeks to protect, the right of access to preliminary hearings, has been guaranteed. The fact that the California Court rejected the constitutional argument does not augur for certiorari since a ruling on that issue will not affect the public's right of access in California one way or the other. Petitioner's argument for a constitutional determination on this issue is, therefore, unpersuasive.

II.

THE FACTS OF THE PRESENT CASE ARE SO UNCOMMON AS TO RENDER IT AN INAPPROPRIATE SUBJECT FOR CERTIORARI.

While a substantial portion of the Petition is devoted to perceived inconsistencies among various rulings in several states on the issue of the public's right of access to pre-trial proceedings, the facts underlying this Petition are such as to preclude the adoption of a uniform rule.

The sole ground upon which a magistrate may close a preliminary hearing under California Penal Code Section 868 is in order to protect the defendant's right to a fair and impartial trial. Indeed, this Court has held squarely that "no right ranks higher than the right of the accused to a fair trial" (*Press-Enterprise v. Superior Court* (1984) ____ U.S. ____, 78 L.Ed.2d 629, 637) and that in certain circumstances even the public's First Amendment right of access must bow to this Sixth Amendment right. (*Gannett Co. v. DePasquale, supra.*)

Here, the magistrate who closed the hearing and sealed the transcript, and later the trial judge who continued the sealing order, acted in a way to insure the Defendant's right to a fair and impartial jury, and hence, a fair and impartial trial. However, in what can be considered a most uncommon, if not rare occurrence in a trial involving death penalty potential, Defendant Diaz ultimately waived his right to a jury trial and thereafter the preliminary hearing transcript was released. (Petition, p. 3, n. 2.)

The Defendant's waiver of a jury trial reduces this case to an *in vitro* situation inviting highly speculative, even imaginative determinations as to what effect pre-trial publicity might have had if the preliminary hearing had not been closed, upon a venire which was never actually assembled. And while a trial judge may be put to a similar task in determining whether or not to close a preliminary hearing, his decision is made in an *in vivo* situation, ultimately affecting only the case presently before him. However, the construction of a uniform rule of law based upon such speculation as would be required here, is quite another matter.

In the *Diaz* case, there were no jurors who could have been purveyed after the trial, nor is there a record of a *voir dire* examination of potential jurors from which any assessment of the effect of pre-trial publicity in this case could be made. Thus, the absence of a jury coupled with the unsealing of the preliminary hearing transcript at a time when the reason for its having been sealed had been vitiated, provides this Court with little more than an abstraction in terms of the factual aspects of this case and the formulation therefrom of a uniform rule of law susceptible of ready application to preliminary hearings generally.

III.

THIS COURT SHOULD NOT REVIEW THE PROCEDURAL RULE BY WHICH CALIFORNIA COURTS DETERMINE WHEN A PRELIMINARY HEARING SHOULD BE CLOSED.

The second Question Presented in the petition is whether the standard for closure under California Penal Code Section 868, a matter of state statutory interpretation, violates the asserted constitutional right of public access to preliminary hearings. Although "petitioner recognizes that this normally would be simply a matter of statutory interpretation, not reviewable by this Court" (Petition, p. 12), it attempts to justify the raising of the issue in this Court by arguing, speculatively, that the standard is "loose" and may allow in the future the closing of preliminary hearings when it is not essential to the preservation of a defendant's fair trial right. But this argument is an insufficient ground on which to justify the granting of certiorari.

Section 868 allows a preliminary hearing to be closed only when there is a necessity to protect a defendant's right to a fair trial. The California statute is directly in conformance with previous decisions of this Court which emphasize that courts should be open and that openness should bow only when higher values, such as a right to a fair trial, are to be served. All that the California Supreme Court has done is set forth a procedure by which a magistrate shall take evidence to determine whether there is a necessity for closure. The articulated standard of a "reasonable likelihood of substantial prejudice" is simply the first step. The press and the public then have the right to overcome the defendant's showing, and can raise all of the issues at that time.

The concurring opinion of Justice Grodin in *Press-Enterprise v. Superior Court* (1984) 37 Cal.3d 772 at pp. 782, 783, provides a succinct answer to the question raised by Petitioner: . . . "I agree with the majority that by its amendment to section 868 the Legislature has decided that open preliminary hearings should be the 'rule rather than the exception' (citation omitted), the exception existing only when exclusion of the public is, to use the language of the statute, 'necessary in order to protect the defendant's right to a fair and impartial trial.'

I agree also that the determination of 'necessity' must inevitably be a matter of judgment based upon probabilities, and that the phrase 'substantial showing of potential prejudice' (or, what amounts to the same thing, a 'reasonable likelihood of substantial prejudice') constitutes a fair description of the requisite assessment. I do not believe that the First Amendment would require more than that."

CONCLUSION

The public has a right of access to preliminary hearings in California, and the decision by the California Supreme Court in this case does not in any way deprive the public of that right. Although the press would like to see answered the question left open in *Gannett Co. v. DePasquale*, the issue is not ripe here. There is no live and meaningful constitutional controversy when the right asserted is specifically protected. Simply stated, the instant case does not present the Court with a clear constitutional question which must be answered, and thus the Petition for Writ of Certiorari should be denied.

Dated: June 18, 1985

Respectfully submitted,

GERALD J. GEERLINGS,
County Counsel for the County of Riverside

By: JOYCE ELLEN MANULIS REIKES,
Deputy County Counsel
GLENN ROBERT SALTER,
Deputy County Counsel

Attorneys for Respondent